STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1794

State of Minnesota,
Respondent,

vs.

Lukas Roy Miller,
Appellant.

Filed November 16, 2020
Affirmed in part, reversed in part, and remanded
Reyes, Judge

Roseau County District Court
File No. 68-CR-18-370

Keith Ellison, Attorney General, Michael Everson, Assistant Attorney General, St. Paul, Minnesota; and

Kristy Kjos, Roseau County Attorney, Roseau, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Reilly, Judge; and Reyes, Judge.

U N P U B L I S H E D O P I N I O N

REYES, Judge

In this direct appeal from his judgment of conviction of one count of fourth-degree controlled-substance sale crime, appellant argues that the district court (1) erred by failing

to sever the three counts of controlled-substance-sale crime against him and that this error prejudiced him; (2) abused its discretion by assigning one-half of a criminal-history point for a 2005 fifth-degree controlled-substance conviction; and (3) abused its discretion by assigning felony points for two 2009 convictions that appellant contends arose out of a single behavioral incident. We affirm in part, reverse in part, and remand for resentencing.

FACTS

Beginning in August 2016, the Pine to Prairie Drug Task Force (task force) conducted and recorded three controlled buys involving a confidential informant (CI) and appellant Lukas Roy Miller. In the first, conducted on August 30, 2016, an officer dropped the CI off near appellant's residence, identified appellant, observed a hand-to-hand exchange between appellant and the CI, and received a baggie from the CI after the exchange containing a substance that appeared to be methamphetamine. The second, conducted on September 8, 2016, followed the same pattern except appellant gave the CI a cigarette box containing what appeared to be methamphetamine. In the third, conducted on November 1, 2016, the CI drove himself to the meeting location near appellant's residence. The CI returned to where officers waited and gave them what appellant gave him, which was another cigarette box containing what appeared to be methamphetamine. After each buy, the CI identified appellant as the person with whom he transacted. Officer B., who conducted the final buy, helped plan the first two buys and spoke to appellant on multiple prior occasions, recognized appellant's voice on each recording. The substances obtained by the CI in each transaction lab-tested positive as methamphetamine. Respondent State of Minnesota charged appellant with three counts of fourth-degree

controlled-substance sale crimes (the three counts) in violation of Minn. Stat. § 152.024, subd. 1(1).

Before trial, appellant moved to sever the three counts. After a hearing and supplemental briefing by the parties, the district court denied the motion. Following a two-day trial, a jury found appellant guilty of all three counts. Appellant did not object to the calculation of his criminal-history score during sentencing, at which the sentencing worksheet for the first count reflected a criminal-history score of five. The district court sentenced appellant to 27 months on the first count and dismissed the other two counts.[1] This appeal follows.

D E C I S I O N

I. Any alleged error by the district court for failing to sever appellant's three counts of fourth-degree controlled-substance sales did not prejudice appellant.

Appellant argues that the district court erred by failing to sever the three counts, which prejudiced him, and entitled him to a new trial. We disagree that any alleged error resulted in prejudice.

"When a defendant's conduct constitutes more than one offense, each offense may be charged in the same charging document in a separate count." Minn. R. Crim. P. 17.03, subd. 1. The district court must sever multiple counts if they are not related. *Id.*, subd. 1(a). We review the district court's decision of whether to sever offenses de novo. *State v. Fitch*, 884 N.W.2d 367, 378 (Minn. 2016).

[1] Despite the state's apparent agreement that appellant's offenses were separate incidents, the district court entered only one judgment of conviction and imposed one sentence.

If the district court improperly fails to sever multiple unrelated offenses, and if that error is prejudicial, then the appellant is entitled to a new trial. *State v. Profit*, 591 N.W.2d 451, 458-60 (Minn. 2007). However, "the ultimate question in a severance claim . . . is one of prejudice." *Id.* at 460. Therefore, remand for a new trial is not required if the district court's error did not prejudice appellant. *Id.* A failure to sever is not prejudicial if evidence of each offense would have been properly received as *Spreigl* evidence, or prior-acts evidence, at trial for the other offenses. *Profit*, 591 N.W.2d at 460-61; *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965) (addressing prior-acts evidence). *Spreigl* evidence may be "admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Ross*, 732 N.W.2d 274, 282 (Minn. 2007). *Spreigl* evidence is admissible at trial if:

> (1) the state gives notice that it intends to use the evidence, (2) the state clearly indicates what the evidence is being offered to prove, (3) the evidence is clear and convincing that the defendant participated in the other offense, (4) the evidence is relevant and material to the state's case, and (5) the probative value of the evidence is not outweighed by its potential for unfair prejudice.

State v. Stewart, 643 N.W.2d 281, 296 (Minn. 2002). In analyzing whether a failure to sever offenses prejudiced a party, we focus on the third, fourth, and fifth prongs. *Ross*, 732 N.W.2d at 282.

First, "there must be clear and convincing evidence that the [appellant] participated in the prior act." *Ross*, 732 N.W.2d at 282. Here, the jury convicted appellant of each count, showing that the evidence presented at trial proved each offense beyond a reasonable

doubt, meeting the lower clear-and-convincing-evidence standard. *See State v. Jackson*, 615 N.W.2d 391, 395 (Minn. 2000).

Second, the evidence of each offense must be relevant and material to the other offenses. *Ross*, 732 N.W.2d at 282. Evidence is relevant and material if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Here, evidence connecting appellant to each offense would have shed light on his motive, identity, and common plan. *Id.* at 282 (discussing the mutual relevance of joined offenses). The district court determined that each offense demonstrated appellant's motive to sell illegal drugs. We agree. Each offense makes more probable appellant's overall objective of selling methamphetamine. In addition, we note that appellant raised the issue of identity in his closing argument. If raised at a trial for one of his offenses, evidence of appellant's involvement in the other offenses would have made his involvement as the seller in the trial offense more likely.

In addition, as the state noted, appellant's offenses also would have been admissible to show a common plan. The closer the relationship between a prior act and the charged act in "time, place, or modus operandi," the greater the prior act's relevance as evidence of a common plan. *State v. Ness*, 707 N.W.2d 676, 688-89 (Minn. 2006). The acts need not be identical, but should be markedly similar. *Id.* Here, the record demonstrates a common plan: appellant sold the same substance in a similar location by a similar method to the

same buyer, all within a relatively short period of time.[2] In sum, the offenses were relevant and material to each other.

Third, the risk of unfair prejudice must not substantially outweigh the probative value of the evidence of each offense. *Ross*, 732 N.W.2d at 282; Minn. R. Evid. 403. "Unfair prejudice under rule 403 is not merely damaging evidence, even severely damaging evidence; rather, unfair prejudice is evidence that persuades by illegitimate means, giving one party an unfair advantage." *State v. Schulz*, 691 N.W.2d 474, 478 (Minn. 2005). The probative value of evidence depends on the "closeness of the relationship between the other crimes and the charged crimes in terms of time, place and modus operandi." *Profit*, 591 N.W.2d at 461. Probative evidence should be admitted unless its tendency to persuade by illegitimate means overwhelms its probative value. *Schulz*, 691 N.W.2d at 478-79.

Here, the offenses occurred within 64 days of each other, in a similar location, and had similar, although not identical, modus operandi. Evidence of each offense, while damaging, is not inflammatory or "likely to persuade by illegitimate means." *Ross*, 732 N.W.2d at 283. Each offense is probative of appellant's identity, motive, common plan, and opportunity, and is not outweighed by potential prejudice to appellant. Because any alleged error for failing to sever the charges against appellant did not prejudice him, we affirm his conviction.

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[2] We also note that, in addition to the grounds raised by the parties and the district court, each offense would have been admissible to show appellant's opportunity to conduct the other sales. Each offense demonstrates that appellant had the means to commit the other offenses, in terms of appellant being acquainted with the CI, residing in the location of the sales, and possessing methamphetamine. *See State v. Kinyon*, 302 N.W.2d 27, 28 (Minn. 1981) (stating that defendant had opportunity to commit crime by his presence in home).

II. The current record does not support assigning one-half of a criminal-history point for appellant's 2005 fifth-degree controlled-substance conviction.

Appellant argues that the district court improperly assigned one-half of a criminal-history point to his 2005 fifth-degree controlled-substance conviction in light of amendments to controlled-substance laws enacted under the Drug Sentencing Reform Act (DSRA). 2016 Minn. Laws ch. 160. Because the record is insufficiently developed with regard to appellant's 2005 sentence, we agree.

The state agrees that appellant's sentence should be remanded for recalculation of his criminal-history score. But we must "decide cases in accordance with [the] law" even when the parties agree on an issue. *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990). We review the district court's criminal-history-score calculation for an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). But the district court's interpretation of the sentencing guidelines presents a question of law, which we review de novo. *State v. Strobel*, 932 N.W.2d 303, 306-07 (Minn. 2019). "The state bears the burden of proof at sentencing to show that a prior conviction qualifies for inclusion within the criminal-history score." *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018).

The Minnesota Sentencing Guidelines provide that *current* Minnesota offense definitions determine the classification of prior convictions for criminal-history-score purposes. *State v. Strobel*, 921 N.W.2d 563, 575 (Minn. App. 2018) (citing Minn. Sent. Guidelines 2.B.7.a.), *aff'd*, 932 N.W.2d 303 (Minn. 2019). Prior to the enactment of the DSRA, all fifth-degree controlled-substance offenses were classified as felonies. *Id.* at

574, n.4. After the enactment of the DSRA, certain fifth-degree controlled-substance offenses are now gross misdemeanors if the substance quantity falls below a certain amount. *Id.* at 574; Minn. Stat. § 152.025, subd. 4(a) (2016). The DSRA applies to crimes committed after its August 1, 2016 effective date. 2016 Minn. Laws ch. 160, § 7, at 585 (codified as Minn. Stat. § 152.025).

Here, appellant's present offenses were committed after the DSRA's August 1, 2016 effective date. For criminal-history-score purposes, the DSRA-amended section 152.025, subd. 4(a), applies to appellant's 2005 conviction. *See State v. Kirby*, 899 N.W.2d 485, 493 (Minn. 2017) (clarifying that "a presumptive sentence is determined by the Sentencing Guidelines in effect on the date of the conviction offense"). If appellant's 2005 conviction is a gross misdemeanor under section 152.025, subd. 4(a), then one-half of a criminal-history point should not be allocated for that conviction. But the record does not show whether the 2005 conviction would constitute a felony or gross misdemeanor under section 152.025, subd. 4(a). As a result, the state did not carry its burden to establish the weight of appellant's 2005 conviction. *Williams*, 910 N.W.2d at 740. However, appellant did not challenge his criminal-history score at the sentencing hearing. When an appellant fails to object to the district court's criminal-history-score calculation and the state did not carry its burden at sentencing, the proper remedy is to reverse and remand "to further develop the sentencing record so that the district court can appropriately make its determination." *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied*

(Minn. July 15, 2008). We therefore reverse and remand to the district court to allow the state to develop the record with regard to appellant's criminal-history score.[3]

III. The current record does not support assigning felony points for two 2009 felony convictions which may have arisen out of a single behavioral incident.

Appellant argues that he can challenge his criminal-history score on the basis that two 2009 felony convictions, which occurred on the same day, should not have each received felony points. Appellant's argument has merit.

Again, as with the 2005 conviction, the record does not contain sufficient information about appellant's 2009 convictions for us to determine the issue. Because we reverse and remand for resentencing based on appellant's second argument, we need not address the merits of appellant's argument here. Instead, we note that appellant may raise his additional challenge to the criminal-history-score calculation on remand. Minn. R. Crim. P. 27.03, subd. 9 ("The court may at any time correct a sentence not authorized by law."); *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007) ("[A] sentence based on an incorrect criminal-history score is an illegal sentence[.] . . . [A] defendant may not waive review of his criminal-history score calculation.").

Affirmed in part, reversed in part, and remanded.

[3] We note that on June 2, 2020, after this appeal was filed, the district court resentenced appellant to 23 months based on a criminal-history score of five. But because the resentencing did not address appellant's argument that his criminal-history score should be lower, our decision to reverse and remand on this issue does not change.